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No. 86-1502

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

SPRING REALTY CO., DUANE THOMAS CO. 129 FRONT CO., DANIEL KATZ, EDWARD KATZ, 465 GREENWICH STREET ASSOCIATES, INC., V. PONTE & SONS, INC., 77 HUDSON, INC., and E.E.E. HOLDING CORP.,

Appellants,

vs.

NEW YORK CITY LOFT BOARD, CITY OF NEW YORK,

Appellees,

and

STATE OF NEW YORK,

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

# MOTION TO DISMISS OR AFFIRM

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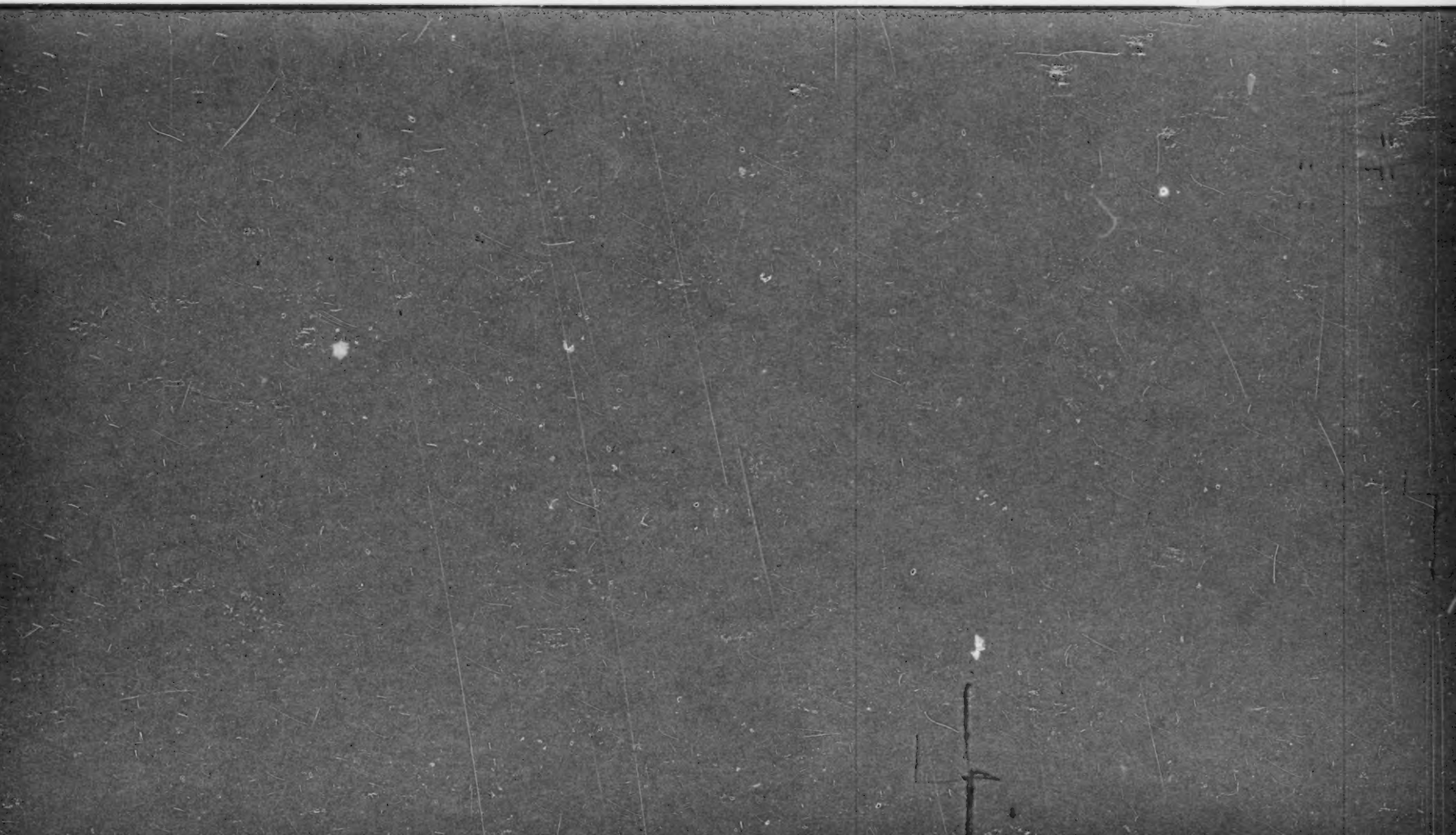
May 16, 1987



## QUESTIONS PRESENTED

1. Whether Article 7-C of the New York State Multiple Dwelling Law (the "Loft Law"), which mandates the staged legalization of formerly commercial buildings illegally converted to residential use, constitutes, on its face, a taking under the Fifth and Fourteenth Amendments of the Constitution.

2. Whether the Loft Law, on its face, constitutes a deprivation of property without due process of law in violation of the Fourteenth Amendment of the Constitution.

3. Whether the Loft Law constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment of the Constitution.

4. Whether the Loft Law impairs the obligations of contract, in violation of Article 1, Section 10 of the Constitution.

5. Whether the Loft Law, insofar as it delegates authority to administer and interpret the statute to a "Loft Board" appointed by the Mayor of the City of New York, is in violation of the due process clause of the Fourteenth Amendment.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED..... | i |
| TABLE OF CONTENTS..... | iii |
| TABLE OF AUTHORITIES..... | iv |
| STATEMENT..... | 1 |
| FACTS ..... | 2 |
| OPINIONS BELOW..... | 9 |
| ARGUMENT | |
| THE APPEAL SHOULD BE DISMISSED FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION. ARTICLE 7-C OF THE NEW YORK MULTIPLE DWELLING LAW, WHICH PROVIDES FOR THE LEGALIZATION OF FORMERLY COMMERCIAL BUILDINGS NOW USED FOR RESIDENTIAL PURPOSES, IS CONSTITUTIONAL IN ALL RESPECTS... | 12 |
| CONCLUSION..... | 29 |
| APPENDIX ..... | A-1 |

TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| Agins v. Tiburon, 447 US 255 (1980) ..... | 14 |
| Allied Structural Steel Co. v. Spannaus, 438 US 234 (1978) ..... | 26 |
| Bowles v. Willingham, 321 US 503 (1944) ..... | 29 |
| Fred French Investing Co. Inc. v. City of New York, 39 NY2d 587, 350 NE2d 381, 385 NYS2d 5, app. dism., 429 US 990 (1976) ..... | 14 |
| Goldblatt v. Town of Hempstead, 369 US 590 (1962) ..... | 14 |
| Golden v. Planning Board of Ramapo, 30 NY2d 359, 285 NE2d 291, 334 NYS2D 138, app. dism., 409 US 1003 (1972) ..... | 13 |
| Hall v. City of Santa Barbara, 797 F2d 1493 (9th Cir. 1986) ..... | 23, 24 |
| Home Building and Loan Association v. Blaisdell, 290 US 398 (1934) ..... | 24 |

Lipkis v. Pikus, 122 Misc2d 136, 471 NYS2d 177 (N.Y. Civ. Ct. N.Y. Co.), aff'd, 122 Misc.2d 833, 473 NYS2d 902 (App. Term 1st Dept. 1983), reversed on other grounds, 103 AD2d 682, 477 NYS2d 345 (1st Dept., 1984) ..... 18

Loretto v United United States, 458 U.S. 419 (1982) ..... 22

MacDonald, Sommer & Frates v. Yolo County, ___ US ___, 106 S Ct 2561, 91 LE2d 285 (1986) ..... 14

McGowan v. Maryland, 366 US 420 (1960) ..... 25

Pennell v. City of SanJose, No. 86-753 ..... 13

Pennsylvania Coal Co. v. Mahon, 260 US 393 (1922) ..... 14

Spring Realty Co. v. New York City Loft Board, 127 Misc.2d 1090, 487 NYS2d 973 (Sup. Ct. N.Y. Co. 1985), aff'd, 117 AD2d 1029, 498 NYS2d 241 (1st Dept.), modified on other grounds, 69 NY2d 658, 503 N.E.2d 1367 (1986) ..... 11

Sylvan Lawrence Co. v. Batista, Index No. 4970/85 (Sup. Ct., N.Y. Co. June 28, 1985), aff'd without op., 118 AD2d 1054, 500 NYS2d 218 (1st Dept. March 27, 1986), app. dsm., 68 NY2d 808, 506 N.E.2d 439 (1986) ..... 18

United States Trust Co. v. New Jersey, 431 US 1 (1977) ..... 27

Wash. ex. rel. Seattle Title Trust Co. v. Roberge, 278 US 116 (1928) ..... 28

Statutes Cited:

New York State Multiple Dwelling Law, Article 7-C ..... passim

United States Constitution Cited:

Fifth Amendment ..... i, 10, 11

Fourteenth Amendment ..... i, ii, 10, 11

Article I, Sec. 10 ..... i

Appendix ..... A-1

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---

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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# MOTION TO DISMISS OR AFFIRM

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## STATEMENT

The appellees, New York City Loft Board and City of New York, move to dismiss the appeal herein on the ground that it does not present a substantial federal

question or, in the alternative, to affirm the final order of the Court of Appeals of the State of New York entered December 16, 1986 on the ground that the questions on which the decision depends are so unsubstantial as not to warrant further argument.

## FACTS

(1)

Article 7-C of the New York Multiple Dwelling Law (the "Loft Law") was enacted to provide for the staged legalization of formerly commercial "loft" buildings which had become residentially occupied without compliance with state housing standards and local building, fire code and zoning provisions. These illegal conversions had occurred as New York City landlords, seeking to fill vacancies in increasingly underutilized manufacturing buildings, rented to tenants who were willing in New

York's extremely tight housing market to invest time and money in transforming raw industrial space to viable living quarters. In return, they were generally given long-term leases at initially modest rates. However, as the popularity of this conversion phenomenon grew, an increasing number of these buildings were being developed outside the bounds of law, posing a threat to the safety and well-being of the occupants of the buildings. Moreover, conflicts were increasing among the various interest groups (landlords, tenants, manufacturers and developers), who were competing for loft space. The already burdened Courts were left to improvise a framework of rights and obligations for the parties to this extra-legal hybrid, the residential loft building.

In response to this situation, the City of New York undertook a careful study of

loft conversion trends, and developed a comprehensive six-part program to respond to the different aspects of the problem. Amended zoning provisions, tax incentives, enforcement capabilities and manufacturing relocation efforts were established locally in 1980-81 to provide a framework for future development. The last piece of the program, which became known as the Loft Law, was enacted by the State Legislature on June 21, 1982, to provide a comprehensive framework for the legalization of most illegal residential lofts.[1]

Article 7-C defines as "interim multiple dwellings" such formerly commercial buildings or portions of buildings, located in a zoning district permitting residential use, as were

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[1]The statute is codified as §§280-287 of the New York State Multiple Dwelling Law. It is included as Appendix H to Appellants' Jurisdictional Statement at 23a-42a.

residentially occupied by three or more families, without a residential certificate of occupancy, during the period of April 1, 1980-December 1, 1981 (§281). Unless the owner obtains a hardship exemption or otherwise removes the building from statutory coverage, the building must achieve compliance with Multiple Dwelling Law fire and safety standards and to obtain residential certificates of occupancy for covered units pursuant to a staged schedule of legalization deadlines set forth in the law (§284).

Legalization costs found reasonable and necessary by the Loft Board are subsequently passed through to the tenants in the form of rent adjustments (§285[5]). Landlords in compliance with Article 7-C are authorized to bring summary proceedings in Housing Court to recover back rent or the possession of the unit for nonpayment of

rent (§285[1]), notwithstanding the absence of the usual jurisdictional prerequisites of a residential certificate of occupancy or Multiple Dwelling Registration Number. After a unit is brought into compliance with Multiple Dwelling Law fire and safety standards, the tenant must be offered a residential lease and the unit becomes subject to New York City's rent stabilization program (§286[3]).

Loft owners may be relieved from complying with Article 7-C through several means. An owner may obtain an exemption from the requirements of the law if the legalization of one or more units would result in a financial hardship to the owner rendering compliance infeasible or would have an unreasonably adverse impact on any commercial uses occupying the same building (§285[2]). Upon obtaining such a hardship exemption, the owner of the building may

restore the space in question to non-residential use. An owner may also purchase a residential occupant's rights in his or her unit, after which the unit may be returned to non-residential use (§286[12]). In addition, an owner may purchase improvements installed or purchased by a tenant and thereby remove the unit from rent regulation pursuant to §286(6).

Article 7-C further authorizes the establishment of a special loft unit known as the Loft Board, made up of representatives of the public, the real estate industry, loft residential tenants and loft manufacturing interests. The Board is vested with the duty of enforcing the provisions of Article 7-C and overseeing the legalization of several thousand residentially occupied loft units. It is specifically authorized to determine issues of coverage under the law, to hear and determine hardship exemption

requests and to issue various rules and regulations (§282). The New York City Loft Board was established by the Mayor on September 30, 1982.

(2)

Plaintiffs herein, who are landlords of properties subject or potentially subject to Article 7-C, brought this action seeking judgment that the statute is unconstitutional on its face and as applied. Plaintiffs moved, and defendants cross-moved, for summary judgment. By order of the Supreme Court, New York County (McLowe, J.), entered July 8, 1985, defendants' cross-motion was granted, and plaintiffs' denied, and Article 7-C was declared and adjudged constitutional. An additional order in the nature of mandamus was also issued, which is not a subject of this appeal.

The order and judgment of the Supreme Court, New York County, was unanimously

affirmed by the Appellate Division, First Department, in an order entered February 13, 1986; and, as to its upholding of the constitutionally of the statute, it in turn was unanimously affirmed by the New York Court of Appeals, by order entered December 16, 1986.

## OPINIONS BELOW

Supreme Court, New York County (McCooe, J.) considered each of plaintiffs' constitutional attacks on the statute and found them to be without merit. The Court found that enactment of the Loft Law was motivated by legitimate concerns as to health, safety and housing and that the means adopted by the Legislature were reasonable to carry out the statutory purposes. Accordingly, it was a valid exercise of the police power and did not offend the Due Process Clauses of the U.S. or State Constitutions. As it was reasonably

related to a legitimate public purpose, the statute was found also not to place impermissible restrictions on the use or return on property. There was no "taking" in the constitutional sense, since owners would continue with a use of their property to which it was reasonably adapted. Moreover, there was a sufficient standard so as to validate the delegation of legislative authority to the Loft Board. There was also no violation of equal protection principles, since the legislative classification was reasonably related to legitimate public purposes, and no unconstitutional impairment of contract. Finally, to the extent the statute was retroactive in nature, such was found to be legally permissible.

The Appellate Division unanimously affirmed without opinion.

The Court of Appeals[2] agreed that the statute was not in conflict with the Due Process Clauses of the State and Federal Constitutions, nor offensive to equal protection principles, on similar grounds to the Supreme Court. The Court further found the statute to be a valid exercise of the police power and not to cause takings without just compensation. Plaintiffs' other attacks on the statutes validity were rejected summarily.

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[2]Since the filling of appellants' Jurisdictional Statement, the Court of Appeals memorandum opinion has been reported at 69 NY2d 658, 503 NE2d 1367 (1986). The Appellate Division order has been reported at 117 AD2d 1029, 498 NYS2d 241 (1st Dept. 1986), and the Supreme Court decision at 127 Misc2d 1090, 487 NYS2d 973 (Sup. Ct. N.Y. Co. 1985).

## ARGUMENT

### THE APPEAL SHOULD BE DISMISSED FOR LACK OF SUBSTANTIAL FEDERAL QUESTION. ARTICLE 7-C OF THE MULTIPLE DWELLING LAW, WHICH PROVIDES FOR THE LEGALIZATION OF FORMERLY COMMERCIAL BUILDINGS NOW USED FOR RESIDENTIAL PURPOSES, IS CONSTITUTIONAL IN ALL RESPECTS.

(1)

The constitutional infirmities which are alleged on this appeal do not present a substantial federal question. Although couched in constitutional terms, plaintiffs' claims are essentially pleas for legislative redress, which would more properly have been raised before the statute was enacted. As constitutional challenges, they have been uniformly rejected without dissent at any level of the New York state courts by applying well-established precedents whose analysis is common to the New York and Federal Constitutions. Thus, there is not

presented a question of national dimension appropriate for consideration by the nation's highest court.[3]

(2)

It is well-settled law that the exercise of the state police power may properly place restrictions on the use or return on property if it is reasonably related to a legitimate public purpose. Golden v. Planning Board of Ramapo, 30 NY2d 359, 381, 205 NE2d 291, 334 NYS2d 138, app. dism, 409 US 1003 (1972). Although an

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[3]It is readily distinguishable from Pennell v. City of San Jose, No. 86-753, a case pending with this Court in which appellants challenge the constitutionality of a San Jose, California rent control law alleged to violate owner's rights by requiring them to assume the public burden of subsidizing low-income tenants. By contrast, the Loft Law does not involve a means test limiting rent increases; and the burdens borne by landlords are the result of permitting illegal conversions of their buildings, not of society-wide problems.

otherwise valid regulation may place such a severe financial burden upon property that an unconstitutional "taking" may result, such a taking occurs only when the regulation leaves the property with no "reasonable productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue thereof." Fred French Investing Co. v. City of New York, 39 NY2d 587, 596, app. dism., 429 US 990 (1976). See also Agins v. Tiburon, 447 US 255, 260 (1980).

This Court has repeatedly held that there is "no set formula to determine where regulation ends and taking begins." Goldblatt v. Hempstead, 369 US 590, 594 (1962). Accord, MacDonald, Sommer & Frates v. County of Yolo, __US__, 106 S.Ct. 2561, 91 L.Ed 2d 285 (1986). The issue is necessarily "a question of degree - and therefore cannot be disposed of by general

propositions." Pennsylvania Coal Co. v. Mahon, 260 US 393, 416 (1922). Yet, appellants herein seek plenary argument of this appeal for the avowed purpose of defining a "uniform standard for determining the level of regulation which is constitutionally permissible" (J.S. 10). However, they offer no suggestion as to the universal standard they would invite this Court to adopt; and their conclusory effort to create a conflict among the circuits, which this appeal from a state court would purportedly resolve, is singularly unpersuasive. (Id.). Indeed, appellants' analysis appears limited to the traditional framework that this regulation, from their perspective, "goes too far."

In any event, the questions raised by appellants are so insubstantial as not to require further argument. Under the settled precedent cited above, Article 7-C is

manifestly a valid exercise of the police power of the State of New York that bears a reasonable relationship to a legitimate public purpose. The statute was enacted as a comprehensive plan base don legislative findings of a serious public emergency created by loft conversions without compliance with state and local law; of an acute shortage of housing; of burdens on local courts from disputes as to the rights and duties of landlords and tenants; and of the necessity of legislation to ensure minimum health, safety and fire protection standards (§280).

The legislature sought to achieve the legitimate purposes of the Loft Law in a patently reasonable way. Because of the multiplicity of purposes and interests involved, the drafting of Article 7-C required a careful balancing of the needs of residential tenants, commercial and

manufacturing tenants, owners, and the public. The resulting statute protects residential tenants by requiring owners to bring their quarters up to minimum standards for health, safety, and fire protection and by reducing the likelihood that they will be forced to relocate, as a result of exorbitant rents, in tight housing market . Id. §286. It protects commercial tenants by recognizing that compliance with the statute should not be mandated when doing so "would cause an unreasonably adverse impact on a non-residential conforming use tenant within the building." Id. §285(2)(ii). It considers the owners' needs by providing for hardship exemptions, id. §285(2), by allowing an owner to pass through the costs of compliance to his residential tenants, id. §286(5), and by providing ways for owners to buy out residential tenants, id. §§286(6), 286(12),

and to bring summary proceedings to recover rent, id. §285(1). The statute considers the needs of the general public by insuring that buildings that are not in areas zoned for residential use are not used residentially. Id. §281(2). In sum, far from being the narrow special interest legislation appellants allege, the Loft Law is a careful balancing of interests which includes important rights for owners of affected loft buildings.

Besides the instant case, the constitutionality of the statute has been repeatedly upheld, without dissent, in other state court decisions. E.g., Lipkis v. Pikus, 122 Misc.2d 136, 145, 471 NYS2d 177 (N.Y. Civ. Ct. N.Y. Co.), aff'd, 122 Misc.2d 833, 473 NYS2d 902 (App. Term, 1st Dept. 1983), reversed on other grounds, 103 AD2d 682, 477 NYS2d 345 (1st Dept. 1984); Sylvan Lawrence Co. v. Batista, Index No.

4970/85 (Sup. Ct., N.Y. Co., June 28, 1985), aff'd without op, 118 AD2d 1054, 500 NYS2d 218 (1st Dept. March 27, 1986), app. dsms., 68 NY2d 808, 506 NE2d 439 (1986).

Appellants' claim of deprivation of property without due process falls far short of overcoming the presumption of constitutionality to which the statute is properly entitled. Indeed, appellants do not take specific issue with the Court of Appeals decision, nor indicate how they believe its reasoning or conclusions were faulty. Instead they limit themselves to detailing the features of the statute which they find objectionable, without relating it analytically to a constitutional framework. No authority is cited to support appellants' apparent assumption that a statute must impose a mandatory limit on costs, guarantee a return on investment, or provide a means of finance compliance, in order to pass constitutional

muster. Yet it is these features which appellants bring forward in support of their claim they have been deprived of property without due process (J.S. 11-12).

In so doing, appellants all but ignore the statutory mechanisms established to provide safety valves for owners for whom compliance would be financially infeasible (§285(2)) or who simply wish to be relieved of rent regulation (§286(6)) or to develop their properties commercially or otherwise outside the ambit of the statute (§286(12)). Neither the record nor the statute support appellants' alarmist speculations concerning owners forced to incur losses to comply with the statute (J.S. 17). Moreover, appellants accord no weight to the significant rights provided them by the statute, which they had been denied in the courts prior to enactment of this legislation -- namely, the ability to assess rent increases after

expiration of a lease (§286(2)), to collect rent in summary proceedings (§285(1)), and to be reimbursed on an amortized basis for the costs of legalization (§286(3)).

To the extent appellants do address these provisions, they indulge in outright misstatements and make claims which are raised for the first time on this appeal. Thus, appellants contend that Article 7-C "actually decreases existing rent in material respects, in that owners are deprived of certain kinds of additional rent which they had been previously charging pursuant to leases" (J.S. 15; original emphasis). This is simply false. The only mention of rent in the statute is contained in Section 286, which provides that tenants continue to pay the rent, including escalators, established in their leases, until the expiration of the lease. They then pay an increase established by Loft Board guidelines and

later pay legalization pass-through increases and further cost-of-living increases mandated by the local rent guidelines board. The statute in no case diminishes current rents.

Appellants further overreach in their discussion of deregulation of rents by purchase of improvements pursuant to §286(6). Thus, they contend that the opportunity afforded an owner to purchase tenants' improvements "requires an owner to buy his own property" (J.S. 19) and that tenants may transfer possession rights to other tenants in exchange for "key money" (Id.). Both statements are false. The improvements a tenant may sell pursuant to Section 286(6) are specifically limited to the improvements made or purchased by the tenant. If an owner has installed improvements and the tenant seeks to sell them, that is a ground for an owner

challenge to the sale (A-2)[4]. Moreover, the Loft Board by regulation specifically prohibits "key money," or the selling of possessory rights in the guise of selling improvements (A-1).

Appellants further attempt to mislead this Court when they allege, apparently in an effort to analogize to Hall v. City of Santa Barbara, 797 F2d 1493 (9th Cir. 1986), that an owner who elects not to purchase improvements "will have no control as to who will live in the property now or in the future" and that the tenant "is in effect given an economic interest in the land that he can use and give away at his pleasure" (J.S. 19). In fact, the Loft Board by regulation has given landlords the same

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[4]Appended to this motion are pertinent sections of Loft Board regulations, paginated as A-1 et seq.

rights to review and approve the suitability of an incoming tenant as granted to landlords of other rent-regulated housing in New York (A-3). This right obtains in subleases as well as assignments, and applies independently whether or not the landlord elects to purchase improvements. (Id.). Moreover, tenants are not permitted to give away their possessory interest at their pleasure, as alleged. Instead, Section 286(6) provides that the right to sell improvements is available on a one-time-only basis and that it may only be exercised after the landlord has first been given an opportunity to purchase at fair market value. Thus, there is not the claim of "taking by physical occupation" raised in Hall or in Loretto v. Teleprompter Manhattan CATV Corp., 458 US 419 (1982).

(3)

Appellants would maintain that they have been unfairly singled out to bear the burdens of this statute, and that the principles of equal protection have thereby been offended (J.S. 20). However, the application of Article 7-C to owners of buildings classified as "interim multiple dwellings," and not to other commercial property owners, cannot be said to "rest on grounds wholly irrelevant to the achievement of the State's objectives." McGowan v. Maryland, 366 US 420, 425 (1960). First, the array of problems posed by the establishment of residential living in lofts exists only in those buildings in which residential conversions have taken place. Second, the history of this phenomenon is that these owners often collaborated with those tenants in the residential conversions, actively or passively. to fill building

vacancies. As the statutory definition of interim multiple dwelling requires that at least three families have resided therefor a period of at least 21 months, (§281), it is reasonable to assume that the owner knew actually or constructively of the use to which is property had been illegally converted. That this owner be held responsible for legalizing such usage cannot be said to be irrational.

(4)

It is also settled law that legislation may modify or abrogate contracts if it is reasonable and necessary to serve an important and legitimate purpose for the general welfare. See Home Building and Loan Association v. Blaisdell, 290 US 398 (1934). As discussed above, Article 7-C clearly meets this test. Certainly, it is readily distinguishable from the legislation at issue in Allied Structural Steel Co. v.

Spannaus, 438 US 234 (1978) and United States Trust Co. v. New Jersey, 431 US 1 (1977), cited by appellants (J.S. 22). These latter statutes were more narrow in focus (in Allied, arguably applying to only a single employer); they did not address such broad economic or social problems as housing and safety, or do so in such a comprehensive manner; they worked a more severe and permanent alteration of a contractual relation, whereas the impact of Article 7-C may be temporary and, if severe, a hardship exemption is provided by statute; they involved an area not before subject to such regulation, whereas housing in New York City is generally subject to regulation; and they were not balanced, reasonable, and necessary to serve an important public purpose, as is Article 7-C.

(5)

The members of the Loft Board are appointed by the Mayor of the City of New York and serve in that capacity as public officials. That they are not necessarily municipal employees (§282) is relevant to issues of salary, pension and conflicts of interest, but does not render them purely "private citizens" (J.S. 23). Their meetings are open to the public and their rule-making has been conducted by public hearing and publication for comments. It is specious to analogize such a board to the group of private landowners involved in Seattle Trust Co. v. Roberge, 278 US 116 (1928), who were found to be "not bound by any official duty, but ... free to withhold consent for selfish reasons or arbitarily (or to) subject the trustee to their will or caprice." Id. at 122. (See J.S. 23). Moreover, to the extent that discretionary power has been

delegated to the Loft Board by the Legislature, adequate standards have been provided to indicate the limit of the agency's power. See Bowles v. Willingham, 321 US 503, 514-15 (1944).

## CONCLUSION

THE APPEALS SHOULD BE DISMISSED FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION. ALTERNATIVELY, THE ORDER APPEALED FROM SHOULD BE AFFIRMED.

May 15, 1987

Respectfully submitted,

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## Appendix

Section I.A of the Rules and Regulations Relating to Sales of Improvements for Interim Multiple Dwellings Pursuant to Section 286(6) of the Multiple Dwelling Law ("Sales of Improvements Regulations"), promulgated February 15, 1985 by the Loft Board, provides in pertinent part as follows:

I. Definitions.

A. "Improvements" - The fixtures, alterations and development of a unit in an interim multiple dwelling which were made or purchased by a residential tenant who is qualified for protection under Article 7-C...

Improvements shall not include other removable household furnishings... nor statutory rights pursuant to Article 7-C, neither of which may be the subject of a sale pursuant to § 286(6) of the Multiple Dwelling Law.

Section III.C. of the regulations provides in pertinent part as follows:

C. Owner's Response to Offer and Proposed Tenant

> Within 10 days of service of the Disclosure Form, the owner may request of the outgoing and prospective tenants such additional information as will enable the owner to decide whether or not to purchase the improvements, and to determine the suitability of the prospective tenant...
>
> If one of the grounds for challenge is the unsuitability of the prospective tenant, the owner must initiate any action based on that ground in a court of competent jurisdiction...

Section IV.B of the regulations provides in pertinent part as follows:

> B. Grounds for Challenge
>
> A challenge fully setting forth the owner's claims may be filed on the following grounds:
>
> ... (2) Some or all of the improvements offered for sale were made or purchased by the owner, not the outgoing tenant...

Section B.3 of the Rules and Regulations Relating to Subletting, Subdivision and Assignment, promulgated by the Loft Board on August 26, 1983, provides in pertinent part as follows:

B. Occupant Qualified for Possession of Residential Unit and Protection of Article 7-C

...

3. When a residential occupant took possession of a residential unit covered as part of an IMD [interim multiple dwelling], on or after June 21, 1982, such occupant shall be qualified for the protection of Article 7-C if: (a) he/she is a prime lessee with a lease currently in effect or, if he/she took possession, with the consent of the landlord as a statutory tenant pursuant to Article 7-C, without the issuance of a new lease; or (b) he/she is the assignee of a prime lessee and such assignment was consented to by the landlord; or (c) prior to establishment of such occupancy, the landlord was offered the opportunity to purchase improvements pursuant to Section 286(6) of the MDL and regulations promulgated pursuant thereto.